No. 84-6811

In The
Supreme Court of the United States
October Term, 1985

WARREN MCCLESKEY,
Petitioner,

v.

RALPH KEMP, Superintendent,
Georgia Diagnostic and
Classification Center,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1.

Is the statistical analysis which was presented to the district court inadequate to prove a constitutional violation, both as a matter of fact and as a matter of law?

2.

Are the arbitrariness and capriciousness concerns of *Furman v. Georgia,* 408 U.S. 238 (1972), removed when a state properly follows a constitutional sentencing procedure?

3.

In order to establish a constitutional violation based on allegations of discrimination, must a petitioner prove intentional and purposeful discrimination?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In addition to the statement of the case set forth by the Petitioner, Respondent submits the following regarding the district court and circuit court proceedings:

Two different studies were conducted on the criminal justice system in Georgia by Professors Baldus and Woodworth, that is, the Procedural Reform Study and the Charging and Sentencing Study. *See McCleskey v. Zant*, 580 F.Supp. 338, 353 (N.D.Ga. 1984). The Petitioner presented his case primarily through the testimony of Professor David C. Baldus and Dr. George Woodworth. Petitioner also presented testimony from Edward Gates as

well as an official from the State Board of Pardons and Paroles. The state presented testimony from two expert statisticians, Dr. Joseph Katz and Dr. Roger Buford.

The district court made the following specific factual findings regarding the trustworthiness of the data base:

> [*T*]*he court is of the opinion that the data base has substantial flaws and that the petitioner has failed to establish by a preponderance of the evidence that it is essentially trustworthy.* As demonstrated above, there are errors in coding the questionnaire for the case *sub judice.* This fact alone will invalidate several important premises of petitioner's experts. Further, there are large numbers of aggravating and mitigating circumstances data about which is unknown. Also, the researchers are without knowledge concerning the decision made by prosecutors to advance cases to a penalty trial in a significant number of instances. The court's purpose here is not to reiterate the deficiencies but to mention several of its concerns. It is a major premise of a statistical case that the data base numerically mirrors reality. If it does not in substantial degree mirror reality, any inferences empirically arrived at are untrustworthy.

McCleskey v. Zant, supra, 580 F.Supp. at 360 (emphasis in original). (J.A. 144-5).

The district court found as fact that "*none of the models utilized by the petitioner's experts were sufficiently predictive to support an inference of discrimination.*" *McCleskey v. Zant, supra* at 361. (J.A. 149).

The district court also found problems in the data due to the presence of multicollinearity. The district court noted that a significant fact in the instant case is that white victim cases tend to be more aggravated, that is correlated with aggravating factors, while black victim

cases tend to be more mitigated, that is correlated with mitigating factors. Every expert who testified, with the exception of Dr. Berk, agreed that there was substantial multicollinearity in the data. The district court found, "*The presence of multi-colinearity substantially diminishes the weight to be accorded to the circumstantial statistical evidence of racial disparity.*" *McCleskey v. Zant, supra* at 364. (J.A. 153). The court then found Petitioner had failed to establish a prima facie case based either on race of victim or race of defendant. *Id.*

Additionally, the district court found "*that any racial variable is not determinant of who is going to receive the death penalty, and, further, the court agrees that there is no support for a proposition that race has any effect in any single case.*" *McCleskey v. Zant, supra* at 366 (emphasis in original). (J.A. 157). "*The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions* [by the prosecutor and jury] *in the State of Georgia.*" *McCleskey v. Zant*, at 368 (emphasis in original). (J.A. 159).

Finally, the district court found that the analyses did not "*compare identical cases, and the method is incapable of saying whether or not any factor had a role in the decision to impose the death penalty in any particular case.*" *McCleskey v. Zant* at 372 (emphasis in original). (J.A. 168). "*To the extent that McCleskey contends that he was denied either due process or equal protection of the law, his methods fail to contribute anything of value to his*

cause.'' *McCleskey v. Zant* at 372 (emphasis in original). (J.A. 169).

The court also found the Respondent presented direct rebuttal evidence to Baldus' theory that contradicted any prima facie case of system-wide discrimination, if one had been established. *McCleskey v. Zant* at 373.

In examining the issues, the Eleventh Circuit Court of Appeals assumed, but did not decide, that the research was valid because there was no need to reach the question of the validity of the research due to the court's legal analysis. The court specifically complimented the district court on its thorough anaylsis of the studies and the evidence. The Eleventh Circuit observed that the first study, the Procedural Reform Study, revealed no race of defendant effects whatsoever and revealed unclear race of victim effects. *McCleskey v. Kemp*, 753 F.2d 877, 887 (11th Cir. 1985) (*en banc*). As to the Charging and Sentencing Study, the court concluded, ''There was no suggestion that a uniform institutional bias existed that adversely affected defendants in white victim cases in all circumstances, or a black defendant in all cases.'' *Id.* Finally, the court concluded the following in relation to the data specifically relating to the county in which the Petitioner was convicted, that is, Fulton County, Georgia:

> Because there were only ten cases involving police officer victims in Fulton County, statistical analysis could not be utilized effectively. Baldus conceded that it was difficult to draw any inference concerning the overall race effect in these cases because there had been only one death sentence. He concluded that based on the data there was only a *possibility* that a racial factor existed in McCleskey's case.

Id. at 887 (emphasis in original).

Any further factual or procedural matters will be discussed as necessary in the subsequent portion of the brief.

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SUMMARY OF THE ARGUMENT

Although the petition in the instant case lists five questions presented, the main focus of this case is simply one of whether there has been racial discrimination in the application of the death penalty in Georgia and, in particular, whether there was racial discrimination in the imposition of the death penalty upon the Petitioner. Another way of looking at this issue is whether the Petitioner was selectively prosecuted and sentenced to death based on his race and that of the victim or whether Petitioner's sentence is disproportionate. Regardless of the standard to be applied, an appropriate consideration is the intent of the decision-makers in question. A review of the cases of this Court dealing with death penalty statutes shows that the general arbitrariness and capriciousness which concerned the Court in 1972 is no longer a consideration if a state follows a properly drawn statute and if the jury's discretion is properly channeled. Thus, the focus in an Eighth Amendment analysis becomes a question of whether the sentence in a given case is "arbitrary" in the sense of being an aberration. The evidence in the instant case shows that the Georgia statutory scheme is functioning as it was intended to function and that those cases which are more severe are receiving stronger penalties while the less severe cases are receiving lesser penalties. There is no evidence to show that the Petitioner's sentence

in the instant case was arbitrary or capricious and no evidence to show that either the prosecutor or the jury based their decision on race.

In relation to an equal protection context, it has always been recognized that intentional and purposeful discrimination must be established for a constitutional violation to be proven. Although intent may be inferred from circumstantial evidence, the circumstantial evidence must be sufficient to establish a prima facie case of discrimination before intent will be inferred. Even if a prima facie case is shown, the Petitioner would still have the ultimate burden of proof after considering any rebuttal evidence.

In evaluating facts and circumstances of a given case, the court must consider the totality of the circumstances in determining whether the evidence is sufficient to find intentional and purposeful discrimination. Although statistics are a useful tool in many contexts, in the situation presented involving the application of the death penalty, there are simply too many unique factors relevant to each individual case to allow statistics to be an effective tool in proving intentional discrimination. Furthermore, the Petitioner's statistics in the instant case were found to be invalid by the district court, which was the only court making any factual findings in relation to those statistics. Thus, the clearly erroneous standard should apply to those factual findings. Furthermore, when a plausible explanation is offered, as it was in the instant case, that is, that white victim cases are simply more aggravated and less mitigated than black victim cases and that various factors tainted the statistics utilized, statistics alone or a disparity alone is clearly insufficient to justify an inference of discrimination. Furthermore, the statistics in question fail

to take into consideration significant factors. Thus, the statistics in the instant case do not give rise to an inference of discrimination.

When reviewing all of the evidence in the instant case, it is clear that the findings of fact made by the district court are not clearly erroneous and that the statistical study in question should not be concluded to be valid so as to raise any inference of discrimination. The Petitioner failed to make a prima facie showing of discrimination and did not carry the ultimate burden of proof on the factual question of intent. Furthermore, Petitioner simply failed to show that his death sentence was arbitrary or capricious or was the result of racial discrimination either on the part of the prosecutor or on the part of the jury.

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ARGUMENT

I. STATISTICAL ANALYSES ARE INADEQUATE AS A MATTER OF FACT AND LAW TO PROVE DISCRIMINATION UNDER THE FACTS OF THE INSTANT CASE.

Respondent submits that the type of statistical analyses utilized in the instant case are not appropriate in a death penalty case when trying to evaluate the motivation behind a prosecutor's use of his discretion and the jury's subsequent exercise of discretion in determining whether

or not a death sentence should be imposed.[1] Each death penalty case is unique and even though statistics might be useful in jury composition cases or Title VII employment discrimination cases where there are a limited number of factors that are permissibly considered, in the instant case where the prosecutor has discretion to pursue a case through the criminal justice system and can consider any number of subjective factors and where a jury has complete discretion with regard to extending mercy, the subjective factors cannot be accounted for in a statistical analysis such as that utilized by the Petitioner in the instant case. Thus, Respondent would submit that this Court should completely reject the use of this type of statistical analysis as inappropriate in this case.

Even in the cases that have utilized statistical analysis in a context other than that present in the instant case, the courts have acknowledged various concerns with these analyses. This Court has recognized in another context, "Statistical analyses have served and will continue to serve an important role as *one indirect* indicator of racial discrimination in access to service on governmental bodies, particularly where, as in the case of jury service, the duty to serve falls equally on all citizens." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S.

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[1]Respondent submits that a claim of discrimination based on race of victim is not cognizable under the circumstances of the instant case. At least one circuit court has specifically rejected statistical evidence based on the race of the victim, finding that the defendant lacked standing. *Britton v. Rogers*, 631 F.2d 572, 577 n.3 (5th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981). Even those justices raising a question of possible racial discrimination in *Furman v. Georgia*, 408 U.S. 238 (1972), seemed to focus on race of the defendant and not race of the victim. Thus, Respondent submits that the instant claim is not cognizable due to the lack of standing.

605, 620 (1974) (emphasis added). In the instant case, however, there is no such uniform "duty" as in the jury composition cases, as all citizens are certainly not equally eligible for a death sentence, nor are even all perpetrators of homicides or murders equally eligible for a death sentence.

A central case regarding the use of statistics by this Court arises in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Again, this was in the context of a Title VII action and not in a case such as the instant one involving so many subjective factors. The Court noted prior approval of the use of statistical proof "where it reached proportions comparable to those in this case to establish a prima facie case of racial discrimination in jury selection cases." *Id.* at 339. The Court also noted that statistics were equally competent to prove employment discrimination, which once again is different from the type of discrimination sought to be proved in the instant case. The Court specifically concluded, "We caution only that statistics are not irrefutable; they come in infinite variety and like any other kind of evidence, they may be rebutted. In short their usefulness depends on all of the surrounding facts and circumstances." *Id.* at 340. Thus, it is imperative to examine all of the facts and circumstances to determine whether the statistics in a given case are even useful for conducting the particular analysis. In *Teamsters, supra*, the Court also had 40 specific instances of discriminatory action to consider in addition to the statistics and noted that even "fine tuning of the statistics could not have obscured the glaring absence of minority line drivers." *Id.* at 342 n.23. Thus, the Court did not focus exclusively on the statistics.

Problems have also been noted revolving around the particular use of statistics in any given case, many of which occur in the studies presented to the district court in the case at bar. In *Bazemore v. Friday*, — U.S. —, 106 S.Ct. 3000 (1986), the Court examined regression analyses and concluded that "the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be" while noting that this would not generally make the analysis inadmissible. *Id.* at 3009. The Court did go on to note that there could be some cases in which the regression was so incomplete as to be inadmissible as irrelevant.

Circuit courts have also utilized statistics but have continually urged caution in their utilization even in jury selection and Title VII cases. Also, the courts frequently had other data on which to rely in addition to the statistical analyses. *See United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971); *Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976). The circuit courts have also recognized that statistical evidence can be part of the rebuttal case itself. The Fifth Circuit Court of Appeals examined a Title VII case in which the statistics relied upon by the plaintiff actually formed the very basis of the defendant's rebuttal case, that is that there was a showing that the statistics were not reliable. *Equal Employment Opportunity Commission v. Datapoint Corporation*, 570 F.2d 1264 (5th Cir. 1978). In that case, the court noted "while statistics are an appropriate method of proving a *prima facie* case of racial discrimination, such statistics must be relevant, material and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion." *Id.* at 1269. *See*

also Johnson v. Uncle Ben's Inc., 628 F.2d 419 (5th Cir. 1980).

Circuit courts have also noted that due to the "inherently slippery nature of statistics" they are also subject to misuse. *See Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. Unit A 1981). In particular, that court focused on the fact that even though multiple regression analysis was a sophisticated means of determining the effects of factors on a particular variable, such an analysis was subject to misuse and should be employed with great care. *Id.* at 402-3. Other courts have emphasized that even though every conceivable factor did not have to be considered in a statistical analysis, the minimum objective qualifications had to be included in the analysis (in an employment context). "[W]hen the statistical evidence does not adequately account for 'the diverse and specialized qualifications necessary for [the positions in question],' strong evidence of individual instances of discrimination becomes vital . . . ." *Valentino v. United States Postal Service*, 674 F.2d 56, 69 (D.C.Cir. 1982).

The Eleventh Circuit Court of Appeals has examined statistical analyses and noted that the probative value of multiple regressions depends upon the inclusion of all major variables likely to have a large effect on the dependant variable and also depends on the validity of the assumptions that the remaining effects were not correlated with independent variables included in the analysis. The court also specifically questioned the validity of stepwise regressions, such as those used in the instant proceedings. *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 621 n.11 (11th Cir. 1983). The court emphasized

that a study had to begin with a decent theoretical idea of what variables were likely to be important.

Thus, examining a statistical analysis depends in part on the question of whether the analysis incorporated the requisite variables and whether there is an appropriate theoretical base for the incorporation of the variables. As found by the district court in the instant case, none of the models utilized by Professor Baldus necessarily reflected the way the system acted and specifically did not include important factors, such as credibility of the witnesses, the likelihood of a jury verdict, and subjective factors which could be appropriately considered by a prosecutor and by a jury. Thus, the district court properly rejected the statistical analyses in question.

More difficult problems arise with the attempted use of statistics in death penalty cases. In 1968 problems were found with the utilization of statistics, specifically presented by Marvin Wolfgang. The circuit court concluded that the study presented in that case was faulty for various reasons, including failing to take variables into account and failing to show that the jury acted with racial discrimination. The court also emphasized that it was concerned in that case with the defendant's sentencing outcome and only his case. The court concluded that the statistical argument did nothing to destroy the integrity of the trial. *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968), *remanded on other grounds*, 398 U.S. 262 (1970).

An additional factor in the death penalty situation comes from the unique nature of the death sentence itself and the capital sentencing system. In *McGautha v. California*, 402 U.S. 183 (1971), the Court noted the diffi-

culty in identifying beforehand those characteristics which could be utilized by a sentencing authority in imposing the death penalty and the complex nature of those factors. Other circuit courts have rejected statistical analyses due to just such a reason. *See Spinkellink v. Wainwright,* 578 F.2d 582 (5th Cir. 1978); *Smith v. Balkcom,* 660 F.2d 584 (5th Cir. 1981), *on rehearing,* 671 F.2d 858 (5th Cir. Unit B, 1982); *McCorquodale v. Balkcom,* 525 F.Supp. 408 (N.D.Ga. 1981), *affirmed,* 721 F.2d 1493 (11th Cir. 1983).

In cases upholding the constitutionality of various death penalty schemes, the Court has recognized that it is appropriate to allow a sentencer to consider every aspect regarding the defendant and the crime in question in exercising the discretion as to whether to extend mercy or impose the death penalty. Thus, in *Eddings v. Oklahoma,* 455 U.S. 104 (1982) the Court noted that the rule set down in *Lockett v. Ohio,* 438 U.S. 586 (1978) was a product of a "history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings, supra* at 110.

Other factors that have been recognized by courts as being appropriate in a death penalty case and in the prosecutor's discretion are the willingness of a defendant to plead guilty, as well as the sufficiency of the evidence available. *Shaw v. Martin,* 733 F.2d 304 (4th Cir. 1984). As recently as 1986, this Court has acknowledged that in a capital sentencing proceeding the jury must make a "highly subjective, 'unique, individualized judgment regarding the penalty that a particular person deserves.'" *Caldwell v. Mississippi,* 472 U.S. —, 105 S.Ct. 2633, 2645-6

n.7 (1985); *Turner v. Murray,* — U.S. —, 106 S.Ct. 1683 (1986). In this context, "it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death." *Turner v. Murray, supra* 106 S.Ct. at 1687. This focuses on what has long been recognized as one of the most important functions that a jury can perform, that is, "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. Illinois,* 391 U.S. 510, 519 n.15 (1968), *quoting, Trop v. Dulles,* 356 U.S. 86, 101 (1958).

Thus, the myriad of factors that are available for consideration by a prosecutor in exercising his discretion and by a jury in determining whether to extend mercy to a given defendant simply makes the utilization of these types of statistical analyses unworkable in a death penalty context. It is simply impossible to quantify subjective factors which are properly considered both by the prosecutor and by the jury in reaching these determinations. In fact, the evidence in the instant case fails to take into account these subjective factors, including the information known to the decision-maker, the likelihood a jury would return a verdict in a particular case, the possible credibility of individual witnesses, the availability of witnesses at the time of trial, the actual sufficiency of the evidence as determined by the prosecutor himself as well as numerous other factors.

In addition to all the above, commentators have also recognized that many of the factors present in the instant case cause problems with utilizing statistical analyses.

Professor Baldus himself has noted that "statistical sophistication is no cure for flaws in model construction and research design." Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L. J. 170, 173 (1975). In that same article, Professor Baldus acknowledged that the deterrent effect of capital punishment was just such a type of study that would be best suited by simpler methods of study than statistical analysis. *Id.* Other authors have questioned the validity of statistical methods which include inappropriate variables in the analysis as well as those which fail to include necessary variables. *See* Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L.Rev. 737, 738 (1980). Other authors have also agreed with the testimony of the experts in this case regarding the problems presented by multicollinearity as well as the problems in utilizing stepwise regressions. *See* Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L.Rev. 702 (1980); *See also* G. Wesolowsky, *Multiple Regression Analysis of Variance* (1976); A. Goldberger, *Topics in Regression Analysis* (1968).

Finally, certain authors have questioned the utilization of statistical analyses even in employment discrimination cases noting "it may be impossible to gather data on many of these differences in qualifications and preferences. Consequently, there will likely be alternative explanations, not captured by the statistical analysis, for observed disparities. . . . These alternative explanations must be taken into consideration in assessing the strength of the inference to be drawn from the statistical evidence." Smith

and Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U.Ill. L.Rev. 33, 45 (1981).

Respondent submits that a consideration of the statistical analysis in the instant case reflects that it simply fails to comply with the appropriate conventions utilized for this type of analysis in that it fails to include appropriate variables, fails to utilize interaction variables, fails to specify a relevant model and has other fallacies, including multicollinearity which render the analysis nonprobative at best. As noted by a statistician in an article regarding race and sex discrimination and regression analysis:

> It should be again emphasized that a statistical analysis provides only a limited part of the total picture that must be presented to prove or disprove discrimination. . . . "No statistician or other scientist should ever put himself/herself in a position of trying to prove or disprove discrimination."

McCabe, *The Interpretation of Regression Analysis Results in Sex and Race Discrimination Problems*, 34 Amer. Stat. 212, 215 (1980).

II. THE STATISTICAL ANALYSES IN THE INSTANT CASE ARE INSUFFICIENT TO PROVE RACIAL DISCRIMINATION.

As noted previously, courts and commentators have expressed reservations about the use of statistics in attempting to prove discrimination. Respondent submits that even if the Court concludes statistical analysis is appropriate in a death penalty context, the "statistics" presented to the district court are so flawed as to have no pro-

bative value and, thus, cannot satisfy the Petitioner's burden of proof.[2]

Petitioner claims that the studies in question are the product of carefully tailored questionaires resulting in the collection of over 500 items of information on each case. The Respondent has proven, and the district court found, that the data bases are substantially flawed, inaccurate and incomplete.

As noted previously, statistical analyses, particularly multiple regressions, require accurate and complete data to be valid. Neither was presented to the district court. Design flaws were shown in the questionnaires utilized to gather data. There were problems with the format of critical items on the questionnaires, such that there was an insufficient way to account for all factors in a given case. "An important limitation placed on the data base was the fact that the questionnaire could not capture every nuance of every case." *McCleskey v. Zant, supra* at 356. (J.A. 136).

Further, the sources of the information were noticeably incomplete. Even though the Petitioner insisted that

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[2]It is clear that the findings by the district court in regard to the question of intent and the evaluation of the statistical analysis are subject to the clearly erroneous rule. In *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), the Court acknowledged that the clearly erroneous rule set forth in rule 52(a) of the Federal Rules of Civil Procedure applied to factual findings. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. This principle has been held to apply to factual findings regarding motivations of parties in Title VII actions and it has been specifically held that the question of intentional discrimination is a pure question of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-8 (1982).

he relied on State sources, obviously those sources were not designed to provide detailed information on each case. As found by the district court, "the information available to the coders from the Parole Board files was very summary in many respects." *McCleskey v. Zant, supra* at 356. (J.A. 137). These summaries were brief and the police reports from which the Parole Board summaries were prepared were usually only two or three pages long. (F.H.T. 1343; J.A. 137). As found by the district court:

> Because of the incompleteness of the Parole Board studies, the Charging and Sentencing Study contains no information about what a prosecutor felt about the credibility of any witnesses. R 1117. It was occasionally difficult to determine whether or not a co-perpetrator testified in the case. One of the important strength of the evidence variables coded was whether or not the police report indicated clear guilt. As the police reports were missing in 75% of the cases, the coders treated the Parole Board summary as the police report. R 493-94. Then, the coders were able to obtain information based only upon their impressions of the information contained in the file. R 349.

McCleskey v. Zant, supra at 357. (J.A. 137).

Furthermore, questionaires were shown to be miscoded. It was also shown there were differences in judgment among the coders. (F.H.T. 387).

Respondent also established that there were numerous inconsistencies between the coding for the Procedural Reform Study and the Charging and Sentencing Study. (J.A. 77-80; S.E. 78; Respondent's Exhibit 20A). These occurred in some variables generally considered to be important in a sentencing determination.

A further problem with the data base is due to the large number of unknowns. Although Petitioner claims to have collected information on over 500 variables relating to each case, the evidence showed that in the Charging and Sentencing Study alone there are an average of at least 33 variables coded as unknown for each questionnaire. (J.A. 139). A review of Respondent's Exhibits Nos. 17A and 18A shows the extent to which unknowns pervade the so-called complete data base. For example, in the Charging and Sentencing Study there are 445 cases in which it was unknown if there was a plea bargain. (S.E. 73-74; J.A. 69-74). Further complicating the data is the fact that Baldus arbitrarily coded unknowns as if the information did not exist without any knowledge as to whether the information was known to the prosecutor or jury.

Even though attempts were made in the district court to discount the unknowns, Petitioner did not succeed. In fact the district court concluded the so-called "worst case" analysis failed to prove that the coding decisions on the unknowns had no effect on the results. (J.A. 142). The Respondent also introduced evidence that the correct statistical technique would be to discard the cases with unknowns in the variables being utilized in the analysis and not utilize the cases in the analysis.[3]

The district court also concluded that no models offered by the Petitioner were sufficiently predictive as to be probative. (J.A. 149). As noted previously, regressions must include relevant variables to be probative. *See*

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[3]This is precisely the reason no independent model or regression analysis was presented by the Respondent. The data base was simply too flawed and eliminating cases with unknowns reduced the sample size to the extent that a valid analysis was futile.

Bazemore v. Friday, supra. No model was used which accounted for several significant factors because the information was not in the data base, *i.e.*, credibility of witnesses, likelihood of a jury verdict, strength of the evidence, etc.[4] Many of the small-scale regressions simply include a given list of variables with no explanation given for their inclusion. Even the large-scale 230-variable regression has deficiencies. "It assumes that all of the information available to the data-gathers was available to each decision-maker in the system at the time that decisions were made." *McCleskey v. Zant, supra* at 361. (J.A. 146). This is simply an unrealistic view of the criminal justice system which fails to consider simple issues such as the admissibility of evidence. Further the adjusted r-squared, which measures what portion of the variance in the dependent variable is accounted for by the independent variables in the model, even in the 230-variable model, is only approximately .5. (J.A. 147). Petitioner also fails to show the coefficients of all variables in the regressions.

Major problems are also presented due to multicollinearity in the data. *See* Fisher, *supra.* (J.A. 105-111). Multicollinearity will distort the regression coefficients in an analysis. (J.A. 106). It was virtually admitted that there is a high correlation between the race of the victim variable and many other variables in the study. According to the testimony of Respondent's experts, this was not accounted for by any analysis of Baldus or Woodworth. Various experiments conducted by Dr. Katz confirmed the

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[4]Although the second study purports to include strength of the evidence variables, there are such a high number of unknowns that it cannot be considered to be effectively included in any analysis.

correlation between aggravating factors and white victim cases and mitigating factors with black victim cases. *See* F.H.T. 1472, *et seq.;* Respondent's Exhibits 49-52. The district court specifically found neither Woodworth or Baldus had sufficiently accounted for multicollinearity in any analysis.

Petitioner has asserted that there is an average twenty point racial disparity in death sentencing rates which he asserts should constitute a violation of the Eighth or Fourteenth Amendments. As noted previously, the statistical analyses themselves have not been found to be valid by any court making such a determination; thus, this analysis is questionable at best. Furthermore, focusing on the so-called "twenty percentage point" effect misconstrues the nature of the study presented. The twenty percentage point "disparity" occurred in the so called "mid-range" of cases. This analysis attempted to exclude the most aggravated cases from its consideration as well as the most mitigated cases. The analysis did not consider whether the cases were actually eligible for a death sentence under state law, but was a consideration of all cases in the study which have been indicted either for murder or voluntary manslaughter.

A primary problem shown with the utilization of this "mid-range" analysis is the fact that Petitioner failed to prove that he was comparing similar cases in this analysis. By virtue of the previously noted substantial variables which were not included in the analysis, it can hardly be determined that the cases were similar.

Further, this range of cases referred to by the Petitioner was constructed based on the index method utilized extensively by Professors Baldus and Woodworth.

Dr. Katz testified for the Respondent concerning this index method and noted that an index is utilized to attempt to rank different cases in an attempt to conclude that certain cases had either more or less of a particular attribute. (J.A. 87). The numbers utilized in the comparisons mentioned above were derived from these indices and the numbers would "purport to represent the degree for a level of aggravation and mitigation in each case for the purpose of ranking these cases according to those numbers." *Id.* Dr. Katz noted that Professor Baldus had utilized regression analysis to develop the indices and had used a predicted outcome to form the index for aggravation and mitigation. Through a demonstration conducted by Dr. Katz utilizing four sample regressions, it was shown that the index method could be shaped to give different rankings from the same cases depending on what variables might be included in a particular regression. Through the demonstration. Dr. Katz showed that by including different variables in the model, the actual values for the index would change. "[T]he purpose of this was to show that at any stage, what is happening with the regression in terms of the independent variables it has available to it, is that it is trying to weigh the variables or assign coefficients to the variables so that the predicted outcomes for the life sentence cases will have zero values and the predicted outcomes for the death sentence cases will have one value, regardless of the independent variables that it has to work with." (J.A. 98-9). The examination of this testimony as well as the exhibits in connection therewith shows that the index method itself is capable of misuse and abuse and, depending on the particular regression equation utilized, the index values can be different. No

adequate explanation was provided for the particular variables included in the regression analysis so as to justify utilizing the index values. Thus, it was simply not shown that the cases being compared to develop this "mid-range" were actually similar. *See McCleskey v. Zant, supra* at 375-6. (J.A. 175).

Additionally, the .06 figure referred to by the Petitioner does not represent a true disparity. The .06 so-called "disparity" does not reflect any particular comparison of subgroups of cases. Further the .06 figure is a weight which is subject to change when variables are added to or subtracted from the model. (J.A. 233).

Regardless of the standard applied or the propriety of utilizing statistics in the instant case, the above shows that the data base is substantially flawed so as to be inadequate for any statistical analysis. Any results of any such analysis are thus fatally flawed and prove nothing about the Georgia criminal justice system.

III. THE ARBITRARINESS AND CAPRICIOUSNESS CONCERNS OF FURMAN V. GEORGIA, 408 U.S. 238 (1972), ARE REMOVED WHEN A STATE PROPERLY FOLLOWS A CONSTITITIONAL SENTENCING PROCEDURE.

Throughout the history of Eighth Abendment jurisprudence this Court has recognized, "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted . . . ." *Wilkerson v. Utah*, 99 U.S. 130, 135-6 (1878). Furthermore, "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punish-

ment, not the necessary suffering involved in any method employed to extinguish life humanely." *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 464, *rhng. denied,* 330 U.S. 853 (1947). Members of the Court have not agreed as to the extent of the applicability of the Eighth Amendment. In *Trop v. Dulles,* 356 U.S. 86 (1958), the Court determined that the question was whether the penalty under examination in that case subjected the individual to a fate "forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." *Id.* at 99. The Court also went on to note that the Eighth Amendment was not a static concept but that the amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity and decency . . . ." *Estelle v. Gamble,* 429 U.S. 97 (1976). In *Ingraham v. Wright,* 430 U.S. 651 (1977), the Court acknowledged that the Eighth Amendment prohibition against cruel and unusual punishment circumscribed the criminal process in three ways: (1) it limits the particular kind of punishment that can be imposed on those convicted; (2) the amendment proscribes punishment that would be grossly disproportionate to the severity of the crime; (3) the provision imposes substantive limits on what can be made criminal and punished as such.

Not until *Furman v. Georgia,* 408 U.S. 238 (1972), was the Court squarely confronted with a claim that the death penalty itself violated the Eighth Amendment. The holding of the Court in that case was simply that the carrying out of the death penalty in the cases before the Court constituted cruel and unusual punishment. *Id.* at 239.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court specifically examined the Georgia death penalty scheme. In so doing, the Court examined the history of the Eighth Amendment and the opinion in *Furman v. Georgia*. The Court noted that the Eighth Amendment was to be interpreted in a flexible and dynamic manner and that the Eighth Amendment was not a static concept. The Court went on to note, however, that the Eighth Amendment "must be applied with an awareness of the limited role played by courts." *Id.* at 174. In upholding the Georgia statute, the Court acknowledged that *Furman* established that the death sentence could not be imposed by sentencing proceedings "that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Id.* at 188. The Court compared the death sentences in *Furman* as being cruel and unusual in the same way as being struck by lightning would be cruel and unusual. The Court further noted that *Furman* mandated that where discretion was afforded to a sentencing body, that discretion had to be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Finally, the Court acknowledged that in each stage of the death sentencing process an actor could make a decision which would remove the defendant from consideration for the death penalty. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentence authorized would focus on the particularized circumstances of the crime and defendant." *Gregg, supra*

at 199. The Court further emphasized that "[t]he isolated decision of a jury to afford mercy does not render unconstitutional a death sentence imposed upon defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice . . . . The proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Id.* at 203. The Court finally found that a jury could no longer wantonly and freakishly impose a death sentence as it was always circumscribed by the legislative guidelines.

The same time as the Court decided *Gregg v. Georgia, supra,* it also decided *Proffitt v. Florida,* 428 U.S. 242 (1976). The Court again noted that the "requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channelled by requiring the examination of specific factors that argue in favor of or against the imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Id.* at 258.

Subsequently, the Court actually criticized states for restricting the discretion of the juries, thus, outlawing statutes providing for mandatory death sentences upon conviction of a capital offense. *See Woodson v. North Carolina,* 428 U.S. 280 (1976). The Court has also prohibited death penalty procedures which restrict the consideration of mitigating circumstances, consistently emphasizing that there must be an individualized consideration of both the offense and the offender before a death sentence could be imposed. Thus, in *Lockett v. Ohio,* 438 U.S. 587 (1978), the plurality noted that the joint opinion in *Gregg, Proffitt* and other cases concluded that in order

to comply with *Furman* the "sentencing procedure should not create a substantial risk that the death penalty was inflicted in an arbitrary manner, only that the discretion be directed and limited so that the sentence was imposed in a more consistent and rational manner. . . ." *Lockett, supra* at 597.

This Court has considered death penalty cases in an Eighth Amendment context, but from a different perspective than the arbitrary and capricious infliction of a punishment as challenged in *Furman.* In *Godfrey v. Georgia,* 446 U.S. 420 (1980), the Court was concerned with a particular provision of Georgia law and the question of whether the Georgia Supreme Court had followed the statute that was designed to avoid the arbitrariness and capriciousness prohibited in *Furman.* This Court essentially concluded that the state courts had not followed their own guidelines. This Court concluded that the death sentence should appear to be and must be based on reason rather than caprice and emotion. As the Georgia courts had not followed the appropriate statutory procedures in narrowing discretion in that case, the Court concluded that the sentence was not permissible under the Eighth Amendment. The Court did not deviate from its prior holding in *Gregg, supra,* that by following a properly tailored statute the concerns of *Furman* were met.

The Court considered the death penalty in an Eighth Amendment context in *Enmund v. Florida,* 458 U.S. 782 (1982). The Court, however, did not consider the "arbitrary and capricious" aspect but focused on the question of the disproportionality of the death penalty for Enmund's own conduct in that case. Thus, the Court essen-

tially concluded that the death penalty was disproportionate under the facts of that case.

In *California v. Ramos*, 463 U.S. 992, 999 (1983), the Court noted that "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with substantive factors the State lays before the jury as a basis for imposing death. . . ." Thus, the Court again focused on the state procedure in question and noted that excessively vague sentencing standards could lead to the arbitrariness and capriciousness that were condemned in *Furman*.

Further, in particular reference to the study in the instant case, Justice Powell observed:

> No one has suggested that the study focused on this case. A "particularized" showing would require—as I understand it—that there was *intentional* race discrimination in indicting, trying and convicting [the defendant], and presumably in the state appellate and state collateral review that several times followed the trial. . . . Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in *Furman*. As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in *Gregg*.

Stephens v. Kemp, — U.S. —, 104 S.Ct. 562 n.2 (1983) (Powell, J., dissenting from the granting of a stay of execution). Justice Powell went on to note "claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia." *Id.*

Respondent submits that reviewing all of the Court's Eighth Amendment jurisprudence, particularly in the death penalty context reflects that in order to establish a claim of arbitrariness and capriciousness sufficient to violate the cruel and unusual punishment provision of the Eighth Amendment, it must be established that the state failed to properly follow a sentencing procedure which was sufficient to narrow the discretion of the decision-makers. As long as the state follows such a procedure, the arbitrariness and capriciousness which were the concern in *Furman v. Georgia, supra,* have been minimized sufficiently to preclude a constitutional violation, particularly under the Eighth Amendment. An Eighth Amendment violation would result in the "arbitrary and capricious" context, only if the statutory procedure either was insufficient itself or the appropriate procedures were not followed. Other death penalty cases under the Eighth Amendment deal with different aspects of the cruel and unusual punishment provision, such as disproportionality or excessive sentences in a given case. That is simply not the focus of the inquiry here. Under the circumstances of the instant case, the Petitioner has not even asserted that Georgia's procedures themselves are unconstitutional, nor has the Petitioner asserted that those procedures which were approved in *Gregg v. Georgia, supra,* were not followed in the instant case. Thus, there can be no serious contention that there is an Eighth Amendment violation under the circumstances of this case. This is particularly true in light of the testimony of Petitioner's own expert that the Georgia charging and sentencing system sorts cases on rational grounds. (F.H.T. 1277; J.A. 154).

Insofar as the Petitioner would attempt to assert some type of racial discrimination under the Eighth Amendment provisions, there should be a requirement of a focus on intent in order to make this sentence an "aberrant" sentence so as to classify it as arbitrary and capricious. A simple finding of disparate impact is insufficient to make a finding of arbitrariness and capriciousness such as was the concern in *Furman, supra,* particularly when a properly drawn statute has been utilized and properly followed. Only a showing of purposeful or intentional discrimination can be sufficient to find a constitutional violation under these circumstances.

No Eighth Amendment violation can be shown in the instant case as Petitioner's own witness testified that the system acted in a rational manner. As shown by the analyses conducted by Professor Baldus and Dr. Woodworth, the more aggravated cases were moved through the charging and sentencing system and the most aggravated cases generally received a death sentence. The more mitigated cases on the other hand dropped out at various stages in the system receiving lesser punishments. Thus, this system does function in a rational fashion. Furthermore, it has not been shown that the death sentence in the instant case was arbitrary or capricious in any fashion. The jury found beyond a reasonable doubt that there were two statutory aggravating circumstances present. The evidence also shows that the victim was shot twice, including once in the head at fairly close range. The evidence tended to indicate that Petitioner hid and waited for the police officer and shot him as the officer walked by. This was an armed robbery by four individuals of a furniture

store in which several people were, in effect, held hostage while the robbers completed their enterprise. It was thoroughly planned and thought out prior to the robbery occurring. Furthermore, the Petitioner had prior convictions for robbery before being brought to this trial. One of Petitioner's co-perpetrators testified against him at trial and a statement of the Petitioner was introduced in which he detailed the crime and even boasted about it. (J.A. 113-115). Thus, under the factors in this case it is clear that Petitioner's sentence is not arbitrary or capricious and there is clearly no Eighth Amendment violation.

IV. PROOF OF DISCRIMINATORY INTENT IS REQUIRED TO ESTABLISH AN EQUAL PROTECTION VIOLATION.

It is well recognized that "[a] statute otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race." *Washington v. Davis,* 426 U.S. 229, 241 (1976), *citing Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). This Court has consistently recognized, however, that in order to establish a claim of discrimination under the Equal Protection Clause, there must be proof that the challenged action was the product of discriminatory intent. *See Washington v. Davis, supra.*

In 1962, the Court examined what was essentially an allegation of selective prosecution and recognized, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles,* 368 U.S. 448, 456 (1962). In cases finding an equal protection violation, it is consistently recognized that the burden is on the petitioner to prove purposeful discrimination under the facts of the case. *See Whitus v. Georgia,* 385

U.S. 545 (1967). The Court specifically has recognized that the standard applicable to Title VII cases does not apply to equal protection challenges. "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to standards applicable under Title VII. . . ." *Washington v. Davis, supra,* 426 U.S. at 239. The Court went on in that case to note that the critical purpose of the equal protection clause was the "prevention of official conduct discriminating on the basis of race." *Id.* The Court emphasized that the cases had not embraced the proposition that an official action would be held to be unconstitutional solely because it had a racially disproportionate impact without regard to whether the facts showed a racially discriminatory purpose. It was acknowledged that disproportionate impact might not be irrelevant and that an invidious purpose could be inferred from the totality of the relevant facts, including impact, but "[d]isproportionate impact . . . is not the sole touchtone of an invidious racial discrimination forbidden by the Constitution. Standing alone it does not trigger the rule [cit.] that racial classes are to be subjected to the strictest scrutiny. . . ." *Id.* at 242.

Again in *Castaneda v. Partida,* 430 U.S. 482, 493 (1977), the Court held that "an official act is not unconstitutional *solely* because it has a racially disproportionate impact." (emphasis in original). Further, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977). In *Washington v. Davis* the Court held that the petitioner was not required to prove that the decision rests solely on racially discrim-

inatory purposes, but that the issue did demand a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id; Village of Arlington Heights, supra.* "Absent a pattern as stark as that in *Gomillion*[5] or *Yick Wo,* impact alone is not determinative, (footnote omitted) and the court must look to other evidence." *Id.* at 266. "In many cases to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population." *Id.* at 266 n.15.

The Court also acknowledged that the Fourteenth Amendment guarantees equal laws, not necessarily equal results. Whereas impact may be an important starting point, it is purposeful discrimination that offends the Constitution. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 273-4 (1979). A discriminatory purpose "implies more than intent as volition or intent as awareness of the consequences. . . . It implies that the decision makers selected or reaffirmed a particular course of action at least in part because of not merely in spite of its adverse effects on the identified group." *Id.* at 279; *see also Wayte v. United States,* — U.S. —, 105 S.Ct. 1524, 1532 (1985). The Court reemphasized its position in *Rogers v. Lodge,* 458 U.S. 613 (1982), in which the Court recognized "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," and acknowledged that a showing of discriminatory intent was required in all types of equal protection cases which asserted racial discrimination.

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[5]*Gomillion v. Lightfoot,* 364 U.S. 339 (1960).

Thus, it is clear from all of the above that a discriminatory purpose, requiring more than simply an awareness of the consequences, must be established in order to make out a prima facie showing of discrimination under the Equal Protection Clause, regardless of the type of equal protection claim that is raised. The burden is on the individual alleging this discriminatory selection to prove the existence of the purposeful discrimination and this includes the initial burden of establishing a prima facie case as well as the ultimate burden of proof.

In relation to the question of an Equal Protection violation, Petitioner has also failed to show intentional or purposeful discrimination. The Petitioner presented evidence to the district court by way of the deposition of the district attorney of Fulton County, Lewis Slaton. Throughout his deposition, Mr. Slaton testified that the important facts utilized by his office in determining whether to proceed with a case either to indictment, to a jury trial or to a sentencing trial, would be the strength of the evidence and the likelihood of a jury verdict as well as other facts. Mr. Slaton observed that in a given case there could exist the possibility of suppression of evidence obtained pursuant to an alleged illegal search warrant which would also affect the prosecutor's decision. (Slaton Dep. at 18). In determining whether to plea bargain to a lesser offense, Mr. Slaton testified that his office would consider how strong the case was, how the witnesses would hold up under cross-examination, what scientific evidence was available, the reasons for the crime, the mental condition of the parties, prior record of the defendant and the likelihood of what the jury might do. *Id.* at 30. As to proceeding to a

death penalty trial, Mr. Slaton testified that first of all the question was whether the case fell within the ambit of the statute and then he examined the atrociousness of the crime, the strength of the evidence and the possibility of what the jury might do as well as other factors. *Id.* at 31. He also specifically noted that his office did not seek the death penalty very often, for one reason because the juries in Fulton County were not disposed to impose the death penalty. *Id.* at 32. He also specifically testified he did not recall ever seeking a death penalty in a case simply because the community felt it should be done and did not recall any case in which race was a factor in determining whether to seek a death penalty. *Id.* at 78.

This is a case in which the Petitioner has in effect by statistics alone sought to prove intentional discrimination. Although Petitioner has alleged anecdotal evidence was submitted, in fact, little, if any, was presented to the district court outside the deposition of Lewis Slaton and one witness who gave the composition of Petitioner's trial jury. As noted previously, Respondent submits that statistics are not appropriate in this type of analysis and the Petitioner's statistics in this case are simply invalid; however, regardless of that fact any disparity noted is simply not of the nature of such a gross disparity as to compel an inference of discrimination, unlike earlier cases before the court. *See e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Absent the "inexorable zero" or a gross disparity similar to that, this type of evidence under the unique circumstances of a death penalty situation should not be sufficient to find an inference of discrimination, particularly when both lower courts have found that no intentional discrimination was proven. Thus, Respondent submits that regardless of

the standard utilized, Petitioner has failed to meet this burden of proof.

Regardless of the standard used for determining when a prima facie case has been established, it is clear where the ultimate burden of proof lies. Under the circumstances of the instant case, it is clear that the ultimate burden of proof rested with the Petitioner and he simply failed to meet his burden of proof either to establish a prima facie case of discriminatory purpose or to carry the ultimate burden of proof by a preponderance of the evidence.

CONCLUSION

For all of the above and foregoing reasons, the convictions and sentences of the Petitioner should be affirmed and this Court should affirm the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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